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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CAROL LONG, EDDIE LOCKHART, and MARCUS PARSONS

Appeal 2016-000260
Application 11/767,762
Technology Center 1700

Before LINDA M. GAUDETTE, N. WHITNEY WILSON, and LILAN REN, *Administrative Patent Judges*.

REN, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants[1] appeal under 35 U.S.C. § 134 from a rejection[2] of claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

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[1] The real party in interest is identified as The Quaker Oats Company, incorporated in the state of New Jersey (Appeal Brief, filed April 6, 2015 ("App. Br."), 2.)

[2] Final Office Action mailed November 6, 2014 ("Final Office Action," cited as "Final Act.").

CLAIMED SUBJECT MATTER

The claims are directed to a grain-based food product with temperature-sensitive inclusion such as chocolate chips. (Spec. ¶ 14.)[3] Claims 1 and 13 are illustrative of the claimed subject matter:

> 1. A method for making a grain-based granola product comprising a temperature-sensitive inclusion having a melting point, said method comprising:
>
> preparing a wet mix by admixing a grain-based substrate with a binder agent at a temperature above the melting point sufficient to liquefy the binder agent;
>
> cooling the wet mix to a temperature approximately equal to or less than the melting point to obtain a malleable wet mix;
>
> adding a temperature-sensitive inclusion to the malleable wet mix with minimal agitation to form a wet mix comprising the inclusion;
>
> spreading the wet mix comprising the inclusion on a surface to form a slab of the wet mix comprising the inclusion;
>
> *drying the slab to essentially solidify the binder agent*;
>
> cooling the dried slab to a temperature sufficient to prevent agglomeration after the slab is shaped; and
>
> shaping the cooled slab to form shaped pieces of the grain-based granola product *comprising a temperature-sensitive inclusion* that essentially retains its identity.
>
> 13. A *grain-based product* comprising a temperature-sensitive inclusion having a melting point that has maintained its identity in the product, the product comprising the dried combination of a grain-based substrate, the temperature-sensitive inclusion, and *a binder agent* having a melting temperature above the melting point and which is essentially solid at ambient temperature after drying.

(Claims Appendix, App. Br. 11, 14 (emphases added).)

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[3] Application 11/767,762, *Grain-Based Food Product with Temperature-Sensitive Inclusion*, filed June 25, 2007. We refer to the "'762 Specification," which we cite as "Spec."

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

van Lengerich	US 5,071,668	Dec. 10, 1991
Moore	US 2005/0053697 A1	Mar. 10, 2005
Slesinski	US 2006/0045937 A1	Mar. 2, 2006

Rachel Keller, *Tips for Cutting Costs at Breakfast*, Living a Better Life, Mar. 25, 2006 ("NPL").

REJECTIONS

Claims 1–20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Moore, in view of Slesinski and van Lengerich. (Final Act. 3.)

In the Examiner's Answer, claims 13–17 are additionally rejected under 35 U.S.C. § 102(b) as anticipated by van Lengerich. (Ans. 14.)[4]

OPINION

Findings of fact throughout this Opinion are supported by a preponderance of the evidence of record.

Obviousness Rejection: Claim 1[5]

Appellants argue that the combined prior art does not teach or suggest a method that includes "drying [a] slab to essentially solidify [a] binder agent" as recited in claim 1. (App. Br. 7.) Appellants, however do not dispute that it is known the making of granola bars requires cooling and that

[4] Examiner's Answer mailed July 29, 2015 ("Ans.").
[5] Appellants do not present separate arguments for claims 2–18, and 20 for the obviousness rejection, they therefore, stand or fall with claim 1 with regard to the obviousness rejection. (*See* App. Br. 7, 9.)

"it is generally known for granola to dry as it cools." (*Compare* Ans. 17 (citing NPL at 4) *with* App. Br. 7–8 & Reply 1–2.)[6] No reversible error, therefore, has been identified in this aspect of the obviousness analysis.

Appellants next argue that the Examiner erred because "Van Lengerich does not explicitly disclose adding temperature sensitive inclusions after the temperature of the mixture it is being added to has been reduced to below the melting temperature of the inclusion." (App. Br. 8.) Appellants, however, do not dispute the Examiner's finding that van Lengerich "teaches that during or after cooling of a heat treated mass/cookie dough, . . . the heat or shear sensitive additives are admixed under conditions such that the additives are not destroyed by high shear conditions or high temperatures and that such parameters are adjusted to prevent loss of the additive." (*Compare* Final Act. 7 *with* App. Br. 8; *compare* Ans. 18–19 *with* Reply 1–2.) Appellants also do not refute the Examiner's reasoning that "the temperature of the granola mixture" in claim 1 is reduced "for the very same reason of preventing excessive melting and size reduction of the temperature sensitive inclusion" as taught in van Lengerich. (*Compare* Ans. 19 *with* Reply 1–2.) No reversible error has been identified here.

Obviousness Rejection: Claim 19

Appellants argue that the Examiner erred in rejecting independent claim 19 because the "teachings of Van Lengerich cannot obviously be combined with those of Moore and Slesinski because it is non-analogous art." (App. Br. 9.)

"In order for a reference to be proper for use in an obviousness rejection under 35 U.S.C. § 103, the reference must be analogous art to the

[6] Reply Brief filed September 29, 2015 ("Reply").

claimed invention." *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004). In particular, to be considered in an obviousness analysis, the art must be analogous "prior art," which means the prior art must be in either the same field of Appellants' endeavor or reasonably pertinent to Appellants' problem. *In re Clay*, 966 F.2d 656, 659 (Fed. Cir. 1992). Whether a prior art reference is "analogous" is a question of fact. *Id.* at 658. Appellants' conclusory statements fail to provide sufficient evidence or argument that van Lengerich is not (i) from the same field of endeavor or (ii) reasonably pertinent to Appellants' problem to persuade us of reversible error.

Anticipation Rejection: Claims 13–17[7]

Appellants argue that the Examiner erred in rejecting independent claim 13 for being anticipated by van Lengerich because "the binder of the claimed invention physically holds the grain-based substrate and inclusions together as a mass, whereas the cookie dough of van Lengerich . . . is a more homogenous mass." (Reply 2.) Appellants also argue, without factual support, that the Examiner erred because van Lengerich "never discusses the use of a binder because a binder is irrelevant to a cookie dough product." (*Id.*)[8]

Product claim 13, as it is currently written, requires only a "grain-based product" having "a binder agent" with a particular temperature characteristic. Appellants' argument, related to the function of the binder

[7] Appellants do not present separate arguments for claims 14–17 for the anticipation rejection, they therefore, stand or fall with claim 13 with regard to the anticipation rejection. (*See* Reply 2.)

[8] Appellants do not disagree that the '762 Specification discloses sugar as an example of the binder agent. (*See* Spec. ¶ 11; *see also* Reply 2.) Appellants also do not disagree that the cookie dough in van Lengerich includes sugar.

agent, is not directed to limitations recited in claim 13 and cannot show patentable distinction of the claim. *In re Hiniker Co.*, 150 F.3d 1362, 1369 (Fed. Cir. 1998) (unclaimed features cannot impart patentability to claims).

DECISION

The Examiner's rejection of claims 1–20 under 35 U.S.C. § 103(a) is affirmed.

The Examiner's rejection of claims 13–17 under 35 U.S.C. § 102(b) is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED